IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 455

THE REPUBLIC OF MEXICO and THE STEAMSHIP "BAJA CALIFORNIA," BY THE REPUBLIC OF MEXICO, as Owner,

Petitioners,

vs.

R. B. HOFFMAN,

Respondent.

RESPONDENT'S BRIEF.

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Reference to Official Reports.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 143 F. (2d) 854. It appears in the record commencing at page 240.

The opinion of the District Court is printed at 45 F. Supp. 519.

Jurisdictional Statement.

The judgment of the Circuit Court of Appeals was filed and entered June 30, 1944 [R. 252]. Petitioners filed a petition for rehearing which was denied August 4, 1944 [R. 252]. They then sought a writ of certiorari in this Court under Section 240 of the Judicial Code (U. S. C.,

Title 28, Section 347) and their petition was granted November 6, 1944.

The jurisdiction of the United States District Court was established by the physical presence of the BAJA CALIFORNIA in the district when process was first issued. The action was for a tort occurring on navigable waters and was within the general admiralty jurisdiction.

Statement of the Case.

This litigation arises out of a collision on October 19, 1941, between the Mexican steamship CAMPECHE, in tow of the Mexican steamship BAJA CALIFORNIA, and the American gas screw schooner LOTTIE CARSON, then at anchor in the harbor of Mazatlan, Sinaloa, Mexico. As a result of the collision the LOTTIE CARSON was sunk and became a total loss. Respondent R. B. Hoffman, as owner of the LOTTIE CARSON, on his own behalf, on behalf of California Packing Corporation, mortgagee of the vessel, and on behalf of underwriters whose claims arose by subrogation [R. 192], filed on December 15, 1941, a libel in the United States District Court for the Southern District of California [R. 4]. The libel was *in rem* against the BAJA CALIFORNIA and *in personam* against Compania Mexicania de Navegacion del Pacifico S. de R. L., the corporation operating the ship both at the time of the collision and at the time of the libel. Pursuant to monition, the vessel was attached by the United States Marshal. Service of process was not effected upon the corporation respondent, and the case proceeded against the vessel alone.

The Republic of Mexico appeared specially, asserting that the vessel was immune from the process of the Court because she was owned by the Mexican Government. At a preliminary hearing on the jurisdictional issues, the evidence showed that the ship, although owned by the Republic of Mexico, was at all material times in the possession and operation of the private corporation. Immunity was therefore denied. The case was tried on the merits and the BAJA CALIFORNIA was held solely at fault. The Mexican Government appealed at first on all grounds, but later limited the appeal to the sovereign immunity point. The Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. Petitioners sought and obtained a writ of certiorari in this Court.

The further history of the case is given in detail in Respondent's Brief in opposition to the petition for a writ of certiorari and need not be repeated here, particularly as petitioners have largely adopted that statement in their Opening Brief. Certain inaccuracies and omissions, however, have crept into the statement given by petitioners. The discussion of the contract whereby the Republic of Mexico turned over the BAJA CALIFORNIA for operation by the private corporation is incomplete. We shall analyze this contract more fully in a later section of this brief. The contract put the BAJA CALIFORNIA in the possession, control and operation of a private corporation in a private freighting venture.

Petitioners' two-fold reference to the second Suggestion of the Attorney General of April 8, 1942 (Brief pp. 3

and 6) is confusing. This Suggestion was not filed until after Judge McCormick's decree had denied petitioners' claim of sovereign immunity. The Suggestion accepted as true the Ambassador's statement that the vessel is the property of the Mexican state but it did not "recognize or allow" anything further. It took no exception to the ruling already made by the Court denying sovereign immunity.

Petitioners' statement of the case does not clearly show that the Republic of Mexico expressly limited its appeal from the District Court's decision to the issue of sovereign immunity after first filing assignments of error covering the merits as well as the immunity point [R. 216]. Nor does petitioners' statement disclose the fact that all three Judges of the Circuit Court of Appeals for the Ninth Circuit agreed that the BAJA CALIFORNIA was a commercial vessel owned by but not in the possession or public service of the Mexican Government and that she was not entitled to immunity.

Summary of Argument.

I. The only issue before this Court is whether a commercial vessel owned by but neither in the possession nor the public service of a friendly foreign power is immune from judicial process.

II. The claim of sovereign immunity was not "recognized and allowed" by our State Department. That issue was left for judicial determination. On that issue there is no dispute as to the facts. They were stipulated to at the hearing before the District Court.

III. The BAJA CALIFORNIA was not in the possession of the Republic of Mexico at the time of the collision or at the time of her seizure under the process of the District Court. She was, on the contrary, in the possession, operation and control of a private corporation.

IV. The BAJA CALIFORNIA was not in the public service of the Republic of Mexico at the time of the collision or at the time of her seizure under the process of the District Court. She was being operated by a private corporation as an ordinary commercial vessel.

V. Since the BAJA CALIFORNIA was neither in the possession nor the public service of the Republic of Mexico, the claim of sovereign immunity was properly denied, regardless of the fact that the Mexican Government had title to the vessel. The authorities cited by petitioners do not sustain the contention that title alone is sufficient to establish immunity for a foreign government-owned merchant vessel from the process of our courts. The modern trend is to restrict, not enlarge, the immunity of state-owned commercial vessels.

ARGUMENT.

I.

The Only Issue Before This Court Is Whether a Commercial Vessel Owned by but Neither in the Possession nor the Public Service of a Friendly Foreign Power Is Immune From Judicial Process.

Petitioners enumerate seven issues presented by this "appeal." Three of the so-called issues simply state, in different ways, the same question, which is whether the plea of sovereign immunity was properly denied. As we shall see later, petitioners' contention necessarily resolves itself down to the invalid proposition that a commercial vessel is entitled to immunity merely because she is owned by a friendly foreign power. Two of the other so-called issues are based on the contention (plainly unsound) that because the State Department accepted as true the statement that the vessel was owned by the Mexican Government (and nothing else), the Court was bound to assume that the claim of immunity was "recognized and allowed" and renounce its jurisdiction.

Another so-called issue repeats the suggestion made in the petition and brief that because the tort was committed by the BAJA CALIFORNIA in Mexican waters the United States District Court should have dismissed the suit. It is true that the right to claim "lack of jurisdiction" on this ground was reserved in the answer [R. 135] and that the point was urged in the second Note of the Mexican Ambassador [R. 161] but the contention was not argued

at the trial, no error was assigned with respect to it, and it was not mentioned on the appeal. The proposition can not be noticed here. *Souzinski v. United States* (1937), 300 U. S. 506. Petitioners were well advised not to press this point. It had no merit. An American citizen may commence a libel in the court of his own nation (in this case in the District Court of his own residence) for a tort committed on navigable waters, even though they be the territorial waters of another state, when the offending vessel is within the district where he files his action. *Panama Railroad Co. v. Napier Shipping Co.* (1897), 166 U. S. 280. In that case this Court said:

> ". . . the law is entirely well settled, both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court."

And see also *Galef v. U. S.* (E. D., S. C., 1928), 25 F. (2d) 134; *Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd de Brasileiro* (E. D., N. Y., 1928), 27 F. (2d) 1002.

The last "issue" is whether the Republic of Mexico waived the plea of sovereign immunity by proceeding to trial on the merits instead of taking an appeal on the jurisdictional issues alone. We made this point in the Circuit Court of Appeals. The majority of that Court held that there was no waiver but that the District Court correctly decided that sovereign immunity did not exist. We are content to stand on the position taken by all three Circuit Judges that there was no right to sovereign immunity in the first place.

II.

The Claim of Sovereign Immunity Was Not "Recognized and Allowed" by Our State Department. That Issue Was Left for Judicial Determination. On That Issue There Is No Dispute as to the Facts. They Were Stipulated to at the Hearing Before the District Court.

In *The Navemar* (1938), 303 U. S. 68, this Court pointed out that in the case of the attachment of a public vessel owned by a friendly government and in its possession, it is open to such government to claim her immunity from suit either through diplomatic channels, or if it chooses, as a claimant in the courts of the United States. Mr. Justice Stone then said:

> "If the claim is *recognized and allowed* by the Executive Branch of the Government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."

The State Department may decline to act at all on the representation of the Ambassador, in which case the foreign government has no recourse but to appear in the action, which it may do specially, and litigate the jurisdictional issues. As has been just shown, the State Department, on the other hand, may treat the immunity of the vessel as primarily a political question and recognize and allow the claim of immunity, in which case it is the duty of the Court to release the vessel.

The State Department, however, may, and often does, take a middle course. It may transmit the representations of the Ambassador to the Court as a matter of comity without "recognizing and allowing" the claim, in which

event the matter is still left for the judicial determination of the Court.

That is exactly what was done in our case. The Suggestion filed by the United States Attorney on January 28, 1942 [R. 32], concludes with the following paragraph:

> "In bringing this matter to the attention of the Court, the United States does not intervene as an interested party, nor do I appear either on behalf of the United States or for the Government of Mexico, and I present the suggestion as a matter of comity between the United States Government and the Government of Mexico *for such consideration as this Court may deem necessary and proper*."*

Obviously the Note of the Mexican Ambassador was simply presented to the Court for its consideration, and the Executive Branch carefully refrained from taking a position on the merits of the immunity issue. A number of cases have occurred in which the diplomatic representations, as here, were merely transmitted for consideration and where the courts proceeded to determine the question of immunity on its merits.

In *The Attualita* (C. C. A. 4th, 1916), 238 Fed. 909, the suggestion was almost in the same form as that in our case "as a matter of comity between the United States Government and the Italian Government, for such consideration as the court may deem necessary and proper." The Circuit Court of Appeals construed this suggestion as an indication that the State Department intended that

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*Italics ours throughout this brief.

the question of sovereign immunity should be judicially determined. On this point the Court said (page 911):

> "The steamship says that in any event her right to immunity is a political question, which has been passed upon by the executive branch of the government. A comparison of the suggestion which was filed in The Exchange, 7 Cranch. 116, 3 L. Ed. 287, with that in this case, shows quite clearly that, while in The Exchange the executive demanded the ship's release, it has in this case carefully refrained from doing anything of the kind."

In *The Katingo Hadjipatera* (S. D., N. Y., 1941), 1941 A. M. C. 581, 40 F. Supp. 546, the suggestion concluded in the identical language used by the United States Attorney in our case. The Court, being uncertain as to the precise effect of this suggestion, caused a telegraphic inquiry to be made to the Department of State which was answered by the acting Secretary of State, Sumner Welles, whose letter is quoted in the report in 1941 A. M. C., page 583, though not in the report in Federal Supplement. This letter stated that the Department of State "feels that the question of the status of the Katingo Hadjipatera is one for judicial determination." The Court thereupon heard the evidence presented by both sides and denied the claim of immunity interposed by the Greek Government. The case was affirmed in the Circuit Court of Appeals on the opinion below (C. C. A. 2d) 119 F. (2d) 1022, and certiorari was denied by this Court (313 U. S. 593).

See also *Lamont v. Travelers Ins. Co.* (1939), 281 N. Y. 362, 24 N. E. (2d) 81; *Hannes v. Kingdom of Rumania Monopolies Institute* (1940), 20 N. Y. S. (2d) 825; *Ulen & Co. v. Bank Gospodarstwa Krajowego* (1940), 24 N. Y. S. (2d) 201.

In contrast to these cases there are a number of decisions where the State Department recognized and allowed the claim of immunity or where it "accepted as true" recitals of fact which necessarily had the effect of recognizing the immunity. These cases show that where the State Department does recognize and allow the claim its Note and the Suggestion are aptly and explicitly worded to that purpose. Thus in *The Ucayali* (1943), 318 U. S. 578, the Suggestion of the United States Attorney prayed "that the claim of immunity made on behalf of the said Peruvian steamship Ucayali and recognized and allowed by the State Department be given full force and effect by this court" and "that the said vessel proceeded against herein be declared immune from the jurisdiction and process of this court."

In *The Maliakos* (S. D., N. Y., 1941), 41 F. Supp. 697, cited by petitioners, the note of the Secretary of State, presented with the Suggestion, said that the State Department "accepts as true the statements of fact contained in the Greek Minister's notes." The Greek Minister had recited that at the time of the arrest of the vessel it was in the *possession* of the Royal Greek Government, was being operated in its service and interest, and was so employed in the service and interest of the whole Greek nation, as distinguished from any individual thereof, and that the Greek Government in the successful prosecution of the war was in urgent need of the vessel and that great damage would ensue should the attachment be continued and the vessel detained. The Court communicated directly

with the State Department in order to confirm its construction of the note and Secretary of State Cordell Hull replied in part as follows:

> "In my letters of August 25, 1941 to the Honorable Francis Biddle, Acting Attorney General, I stated that the statements of fact contained in the notes of the Greek Minister at Washington were accepted as true. By this statement I intended to convey the understanding that I recognized as warranted the claim of immunity made by the Greek Minister with reference to these steamships."

Under the circumstances the Court very properly dismissed the libel *in rem*.

In *Miller v. Ferrocarrill Del Pacifico de Nicaragua* (1941), 18 Atl. (2d) 688, a decision of the Supreme Judicial Court of Maine, also cited by petitioners, an action was brought directly against the defendant governmental corporation to recover compensation for legal services rendered in connection with a claim for refund of certain taxes. In this case the Suggestion did not expressly "accept as true" the diplomatic representations, but these representations set out that our own government had already recognized the defendant corporation as an instrumentality of the Nicaraguan Government, and had entered into a treaty with Nicaragua in connection with this very claim for the tax refund. The Secretary of State requested the Attorney General to "instruct the appropriate United States Attorney to appear before the Court at this hearing and to represent to the Court the position of the Nicaraguan Government as above set forth." The Maine Supreme Court concluded that this was tantamount to recognition and allowance of the claim of the Nicaraguan

Government. It pointed out that the statement relative to the recognition by this Government and to the treaty was peculiarly within the knowledge of the Executive Department of our Government. If it had been untrue, the Maine Court said, the Secretary of State would not have permitted such an assertion of fact to be made without denial or explanation. The Court distinguishes this situation from the *Lamont* and *Hannes* cases, *supra*, as follows:

> "But the plaintiffs, relying on the case of Lamont *et al.* v. Travelers Insurance Company *et al.*, 281 N. Y. 362, 24 N. E. 2d 81, further contend that the action should not have been dismissed because neither the Attorney General of the United States nor the Assistant United States Attorney for the District of Maine suggested a dismissal. It is not necessary that a suggestion of dismissal should have been made by either of them.
>
> "The instant case is unlike the Lamont case. In that case, and in Hannes v. Kingdom of Roumania Monopolies Institute, 1940, 260 App. Div. 189, 20 N. Y. S. 2d 825, although acting at the suggestion of the Secretary of State, the Attorney for the United States was very careful to present to the court what amounted to nothing more than a mere plea of immunity made by the foreign government, thus raising only an issue of fact to be decided by the court; for, in each of those cases, it was explicitly stated that the matter was presented for 'such consideration as the Court may deem necessary and proper.' (281 N. Y. 362, 24 N. E. 2d 86.) It is no wonder that the court concluded from that presentation, so carefully and qualifiedly made, that the executive branch of our government had not indicated that it had taken any position as to the foreign government's claim of

sovereignty, but had left the issue to be determined by the court on the facts and the law.

"In the case at bar, however, no question is raised by the Attorney for the United States for judicial determination. On the contrary, in effect, by way of suggestion, he called the attention of the court to the fact that the executive branch of our government, which is supreme in its own sphere, had already acted in the matter, and that the claim made by the Republic of Nicaragua 'through the diplomatic channels of the Department of State of the United States' to the effect that the defendant corporation was and is, in fact, an instrumentality of the government of Nicaragua, had already been recognized by the government of the United States in connection with said claim for refund of taxes, and in the treaty itself."

The case, therefore, holds that where the State Department transmits a diplomatic representation as to certain transactions of our own Government and takes no exception thereto, it impliedly "accepts as true" *the facts* recited. The Court took the view that those facts were sufficient as a matter of law to entitle the defendant to immunity. In our case, however, the only representation of fact made at any time by the Mexican Ambassador is that the BAJA CALIFORNIA was owned by the Republic of Mexico. This fact was established by the evidence and conceded by all parties. All that the State Department accepted as true was the ownership of the vessel. This is *not* sufficient, as a matter of law, to confer sovereign

The case of *Sullivan v. State of Sao Paulo* (E. D., N. Y., 1941), 36 F. Supp. 503 (C. C. A. 2d), 122 F. (2d) 355, is clearly distinguishable from ours. There an action was commenced against the State of Sao Paulo to recover principal and interest on certain bonds. After the suit was filed the Brazilian Ambassador sent a letter to the State Department asserting the alleged immunity of the State of Sao Paulo. The State Department requested the United States Attorney to submit a written suggestion. Certain correspondence ensued to obtain clarification as to the extent to which the State Department had recognized and allowed the claim of the United States of Brazil and its federated state. These letters are printed in the margin of the report of the decision of the District Court (36 F. Supp. 504 and 505). The first letter indicates that the State Department had no doubt as to the accuracy of the statements contained in the Ambassador's note concerning the status of the Brazilian states or the statements concerning the ownership and disposition of the funds. The letter concluded that it was the practice to leave the question of immunity to the courts, applying the principles of international law to the facts and circumstances of the particular cases. A second letter from the State Department went further and stated that the Department's action implied an acceptance as true of the statements of fact made by the Brazilian Government, but that it was felt that the ultimate decision of the question of immunity should be left to the Court. The letter said finally that it was the view of the State Department that the interest

of the Government of Brazil in the funds is of such character as to entitle them to immunity from attachment by private litigants. The lower court accordingly took the view that the *facts* were established by the Suggestion. But the Court did not *ipso facto* dismiss the suit. It then went on to decide, as a matter of law, whether these facts justified the granting of sovereign immunity. The case went up on appeal to the Circuit Court of Appeals (122 F. (2d) 355). That Court thought "some favorable implication must be drawn" from the fact that the State Department acted at all, and that the transmittal of the claim constituted an implied recognition of the recitals of fact. The decision points out that when pressed, the State Department went much further and not only vouched for the accuracy of the statements of fact but expressed the view that they were of such character as to entitle the funds to immunity. The majority of the Court, however, held that the adjudication of present rights to property within a court's jurisdiction is a purely judicial function. The question of immunity was considered on its merits, and the Court concluded that the immunity should be granted. Judge Learned Hand wrote a specially concurring opinion in which he was disposed to place the affirmance of the lower court's decision on the ground that the action of our State Department, as clarified by its correspondence, indicated that the Department thought the issue important enough for the District Court not to proceed and that therefore the Court should decline to exercise jurisdiction.

It will be seen that in the *Sullivan* case, the State Department not only accepted as true the facts which justified a claim of immunity but expressed the opinion that the claim was well founded. In our case, the State Department did *not* recognize or allow the claim of immunity. It left that wholly to the Court.

A recent decision of the New York Court of Appeals, *United States of Mexico v. Schmuck* (1944), 56 N. E. (2d) (N. Y.) 577, 580, summarizes the effect of the two forms of suggestion as follows:

> "A mere suggestion of immunity or assertion by a sovereign that a defendant sued here is its agent or that property seized under process of a court belongs to the sovereign does not, however, compel the court to decline jurisdiction or preclude judicial inquiry into the facts—even though the suggestion be presented to the court by the Attorney General upon the request of the Department of State. A suggestion so presented is only the allegation of a claim and 'gives to the foreign government only the right to intervene and prove its allegation' unless the Department of State does more than present the suggestion for 'such consideration as the Court may deem necessary and proper.' Lamont v. Travelers Ins. Co., 281 N. Y. 362, 372, 374, 24 N. E. 2d 81, 85, 86. The situation is different when the claim has been examined by the 'political arm of the Government charged with the conduct of our foreign affairs' and has been *recognized and allowed* by it. *Ex parte* Peru, *supra*, 318 U. S. page 588, 63 S. Ct. page 800, 87 L. Ed.

> 1014. The court there said that 'upon recognition and allowance of the claim by the State Department and certification of its action presented to the court' by the Attorney-General, it is the duty of the court to decline jurisdiction, surrender the property held by virtue of its process and remit a plaintiff to the relief obtainable through diplomatic channels."

In our case the State Department "accepted as true" the fact, which nobody denied, that the BAJA CALIFORNIA was owned by the Republic of Mexico but did not accept as true that she was in the possession or service of Mexico, or recognize or allow the claim of immunity. On the contrary, that issue was expressly left for the Court's judicial determination. The State Department did not direct, or even recommend, the release of the vessel.

There was no dispute as to the facts. Most of them are covered by a stipulation [R. 25] and at the hearing the statement of facts contained in the stipulation was expressly confirmed [R. 112, 113]. Documentary evidence was admitted without objection on either side, the authenticity of which was not challenged. This evidence will be more fully examined in the next two sections. It shows:

1. That the BAJA CALIFORNIA was not in the possession of the Republic of Mexico either at the time of the collision or at the time of its seizure under judicial process.

2. That the BAJA CALIFORNIA was not in the public service of the Republic of Mexico at either of said times.

III.

The Baja California Was Not in the Possession of the Republic of Mexico at the Time of the Collision or at the Time of Her Seizure Under the Process of the District Court. She Was, on the Contrary, in the Possession, Operation and Control of a Private Corporation.

The District Court expressly found on the record that [R. 192]:

> "At the time of the collision hereinafter referred to and at the time of filing the libel and the service of the monition herein, she (the BAJA CALIFORNIA) was in the possession, operation and control of respondent Compania Mexicana de Navegacion del Pacifico S. de R. L."

The Circuit Court of Appeals agreed with this finding [R. 244].

Concurrent findings of fact of two courts below will be accepted by this Court as conclusive unless plainly erroneous or unsupported by evidence. *Workman v. New York* (1900), 179 U. S. 552, 555; *The Wildcroft* (1902), 201 U. S. 378, 387; *Virginian R. Co. v. System Federation No. 40* (1937), 300 U. S. 515, 542.

The record supports the findings of the courts below. It was stipulated in writing and admitted in open court by proctors for the Republic of Mexico that the steamship BAJA CALIFORNIA was "delivered by the Mexican Government on August 27, 1941, to the Cia Mexicana de Navegacion del Pacific," the corporation made a respondent *in personam* in the libel, and that the said BAJA CALIFORNIA was on and after October 3, 1941, "and at the time of seizure under process herein, *being operated by* the said

Cia Mexicana de Navegacion del Pacifico under the terms and conditions of the contract designated said Republic's Exhibit 'A'" [R. 27].

The above mentioned contract itself recites the fact that the BAJA CALIFORNIA was *delivered* by the Mexican Government to Mr. Abaunza, who is the general manager of the respondent corporation, on the 27th of August, 1941 [R. 49].

Full provision for the formalities and details of transfer or delivery of the ship to the corporation is contained in the Sixth Article of the contract [R. 51]. The contract provided that the corporation was to "commercially operate and handle" the vessel for a period of five years with an option to renew the contract for an additional five years [R. 49, 60]. The respondent is a privately-owned and operated corporation, with a paid in capital of one hundred thousand pesos [R. 49].

The Mexican Government, doubtless because it was aware of the universal maritime rule of liability *in rem* for cargo and collision damage for which the vessel is responsible, inserted the following provision in the contract:

> "Fifth: The company promises to insure the said ships against all risks, and to keep in operation the respective insurance policies for the duration of this contract" [R. 50].

This provision, and the Third Article relating to operating expenses, show that the entire risk of the venture was intended to be thrown upon the corporation. It was in no sense the *alter ego* or mere operating agency for the government. The arrangement amounted in effect to a five-year demise charter. If there were losses arising from

the operation or handling of the BAJA CALIFORNIA, they were to be borne by the corporation—presumably either from accumulated surplus, if any, from capital, from loans, or from insurance policies covering "all (insurable) risks." If the aggregate expenses were less in amount than the gross income, the corporation was to pay to the government an amount equivalent to one-half the net profits.

In pursuance of the terms of the contract the respondent corporation did retain possession of the BAJA CALIFORNIA and direct her commercial operation. It was stipulated that the master of the BAJA CALIFORNIA if called as a witness would have testified:

> "All moneys received by me from the operation of the BAJA CALIFORNIA were accounted for to Mr. Abaunza, as manager of the Cia Mexicana de Navegacion del Pacifico, and all expenses (as defined in Paragraph 'Third' of Exhibit 'A') incurred in operating the said BAJA CALIFORNIA, *including the salaries and wages of its officers and crew, who were employed by the Cia Mexicana de Navegacion del Pacifico*, and the cost of supplies necessary for the operation of said ship, were paid for with money delivered by the said Cia Mexicana de Navegacion del Pacifico" [R. 30].

Were there any doubt as to the fact that the corporation, rather than the government, was in possession of the vessel at the time of its seizure, the master's statement just recounted, which was admitted to be true for all purposes by the Republic of Mexico [R. 111], would be determinative. As will be seen in the discussion of *The Navemar* and other cases, *infra*, when a private corporation receives the ship's gross income, disburses all its ex-

penses, *including the salaries of the officers and the wages of the crew*, mans, equips and supplies the ship, and completely manages the commercial operation of the vessel, there is no escape from the finding that the corporation has the *actual physical possession* of that vessel. And when that is the case, it is futile for the government to claim that it, too, has the *actual physical possession* of the vessel, particularly, as in this instance, when the corporation manned the ship with its own employees. But unless the government has that realistic sort of possession it is not entitled to resist the jurisdiction of our courts on a plea of sovereign immunity. The officers and crew were not agents of the Republic, and did not hold the vessel on behalf of the government.

"Constructive possession" or "right to possession" at some future time will avail the foreign sovereign nothing as a basis for a plea of sovereign immunity under the decisions of this Court. See *The Navemar*, 303 U. S. 68; *The Davis*, 77 U. S. (10 Wall.) 15.

Thus all the evidence in the record establishes the fact that a private corporation and not the Mexican Government was in possession of the BAJA CALIFORNIA at all times mentioned in the libel and at the time of the seizure of the vessel by the United States Marshal. There is no contrary evidence. No contention is made in petitioner's opening brief that the Mexican Government had possession. They talk vaguely about "dominion" and "control." The fact is that the Republic had no more dominion or control over the BAJA CALIFORNIA than it had over any other vessel in the Mexican merchant marine. Only in the event of a default did the Republic have the right to retake possession of the vessel. No such default had taken place here.

IV.

The BAJA CALIFORNIA Was Not in the Public Service of the Republic of Mexico at the Time of the Collision or at the Time of Her Seizure Under the Process of the District Court. She Was Being Operated by a Private Corporation as an Ordinary Commercial Vessel.

As will be seen from the authorities referred to in the next section, one of the requirements for a successful claim of sovereign immunity is that the vessel be employed in public service. Petitioners assert that the BAJA CALIFORNIA was in "the public service of Mexico". This contention seems to be based on three theories:

1. That the operating agreement specified that the "public service" is the object of the contract.

2. That the case is within the rule of *Berizzi Bros. Co. v. The Pesaro* (1926), 271 U. S. 562.

3. That the BAJA CALIFORNIA had certain special "governmental" privileges and is subjected to certain "governmental" obligations which, when taken together, brought its operation within the concept of "public service".

None of these theories has any merit. We discuss them in order.

The only sense in which the term "public service" is used in the contract between the corporation and the Republic is that the BAJA CALIFORNIA was being operated as a common carrier serving the public generally. But such public service is not sufficient to confer immunity. If it were, no vessel employed as a common carrier would be subject to the process of any court. "Public service"

for the purpose of sovereign immunity, means service for the direct benefit of the government or the nation as a whole.

It is true that *Berizzi Bros. Co. v. The Pesaro* held that the vessel in that case was engaged in public service as that term is used in the law of sovereign immunity. But the BAJA CALIFORNIA cannot bring herself within the principles of that decision.

In that case there was a libel *in rem* for damages arising from the nondelivery of cargo. The Italian Ambassador appeared specially with a plea of sovereign immunity in which he alleged:

> "That the vessel at the time of her arrest was owned *and possessed by that government, was operated by it in its service and interest.*"

At the hearing it was stipulated that

> "the vessel, when arrested, was owned, *possessed and controlled by the Italian Government* . . . was employed in the carriage of merchandise for hire . . . *and was so employed in the service and interest of the whole Italian nation, as distinguished from any individual member thereof, private or official.*"

And finally, in phrasing the issue presented to it by an appeal from the dismissal, this Court said:

> "The single question presented for decision by us is whether a ship owned *and possessed by a foreign government, and operated by it* in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal District Court exercising admiralty jurisdiction."

Thus, there can be no doubt as to what the contentions were, what the facts were, and what the precise scope of the decision was. In affirming the District Court's dismissal of the libel, this Court relied on and extended the rule of *The Exchange*, 7 Cranch. 116, where sovereign immunity was successfully claimed for a vessel "*possessed by the French government as a warship.*" The Court believed that the principle of *The Exchange* was applicable, because when a government "acquires, *mans, and operates* ships in the carrying trade they are public ships in the same sense that warships are."

The rule of *Berizzi Bros. Co. v. The Pesaro* does not apply to the BAJA CALIFORNIA, because *The Pesaro* was "*possessed*", "*controlled*", "*operated*", and "*manned*" *by the Italian Government*, and "was so employed in the service and interest of the *whole Italian nation, as distinguished from* any individual member thereof, private or official."

The BAJA CALIFORNIA, on the other hand, was "*possessed*", "*controlled*", "*operated*," and "*manned*" *by a private corporation*, and was not employed by it in the interest of the whole Mexican nation, as distinguished from any individual member thereof.

If it be suggested that *government ownership alone* is sufficient to bring a foreign vessel within the rule of *Berizzi Bros. Co. v. The Pesaro*, or that the rule of the case should be so extended, the answer to the first part of the suggestion is that such a construction of the opin-

ion would torture the decision beyond recognition, and the answer to the second part of the suggestion is that such an extension of the rule is foreclosed by the authorities, to be discussed in the next section of this Brief.

The third and last "public service" theory advanced by petitioners seems to be (Petitioners' Brief, p. 19) that certain "governmental" privileges accorded the BAJA CALIFORNIA by the contract and certain "governmental" obligations imposed upon the vessel by the contract, place the vessel in the public service of the Government of Mexico. This argument is destroyed by a reference to the general Mexican Law applicable to common carriers, from which it will be seen that these alleged "governmental obligations and privileges" specified in the contract are not peculiar to the BAJA CALIFORNIA but are applicable to any Mexican merchant vessel.

A comparison of the contract under which the BAJA CALIFORNIA was being operated and the translation of the Mexican law of "the general lines of communication" [R. 83-110] shows that the corporation, in its operation of the BAJA CALIFORNIA, is treated in all substantial respects the same as are all other private corporations engaged in the merchant shipping business. Thus the contract provision for one-half the net profits [R. 50] is merely a compliance with Article 110 of the General Law [R. 100] providing for governmental "participation" in the revenue of all private shipping companies. The provisions of Article 8 of the contract that the routes shall be approved by the Government [R. 51] simply follow

Article 200 of the General Law applicable to all the Mexican merchant marine [R. 104]. The requirement that naval, army or political officers should be transported free or at reduced rates [R. 52] is an exact paraphrase of the General Law applicable to all merchant ships. See Articles 57, 58, 102, 104 and 118 [R. 95, 96, 99, 100]. The provisions giving port facilities [R. 54, 55] are not basically different from Articles 27 and 183 of the General Law [R. 92, 102]. The "sovereign control" of the Mexican Government over the services provided in the contract is a mere restatement of the General Law applicable to the termination of all concessions and contracts and the revocation of permits [R. 92]. The alleged power to replace the management relates only to a situation when the corporation might be in default. And even then, in most cases, there must be a hearing before the contract can be terminated [R. 60]. Unless the corporation breached the agreement, the Republic had no authority to dispossess the corporation for five years [R. 60].

The master's summary of the ship's operations for a period of two months from the time of the collision to the time of the seizure under process herein, which has been admitted as true for all purposes by the Republic of Mexico [R. 111], is not the story of a ship in governmental service. It is the story of a typical tramp merchant ship engaged in coastal and foreign trade, carrying, with a few inconsequential exceptions, private cargo at the regular rates and private passengers at full fare [R. 28-30]. The corporation was simply engaged in the

transportation of passengers and cargo for hire and the BAJA CALIFORNIA was no more "in the public service" of the Republic of Mexico than is any other vessel in that nation's merchant fleet.

These operations were peacetime operations. The Republic of Mexico was not at war until May 29, 1942.

We now turn to a consideration of the authorities on sovereign immunity. We are concerned with a ship which is privately operated and which is subject to the same obligations and entitled to the same privileges as are other Mexican ships. We might add that all ships, including those of our own merchant marine (at least in times of peace) are subject to substantially the same governmental obligations (reduced rates, etc.) and are entitled to similar privileges (subsidies, etc.). Obviously all Mexican ships, as well as American ships and ships of other countries, performing "public services" *in this broad sense* of the word cannot be accorded sovereign immunity. Such a course would create international havoc rather than comity. The factual basis for the plea of sovereign immunity by the Republic of Mexico is thus narrowed down to *title* alone. This, under well settled law, and the decisions of this Court, is not a sufficient reason for requiring a court to withhold its normal jurisdiction.

V.

Since the Baja California Was Neither in the Possession nor the Public Service of the Republic of Mexico, the Claim of Sovereign Immunity Was Properly Denied, Regardless of the Fact That the Mexican Government Had Title to the Vessel. The Authorities Cited by Petitioners Do Not Sustain the Contention That Title Alone Is Sufficient to Establish Immunity for a Foreign Government Owned Merchant Vessel From the Process of Our Courts. The Modern Trend Is to Restrict, Not Enlarge, the Immunity of State Owned Commercial Vessels.

In *The Navemar* (1938) 303 U. S. 68, this Court held that a vessel owned by, but *not in the possession or public service* of a foreign government was not entitled to immunity. The NAVEMAR was libeled by a private company under a claim of ownership. It was asserted that the crew unlawfully deprived libelant of the possession of the vessel. The Spanish (Loyalist) Government claimed that the vessel was immune from process, in that title had been taken by the Government as the result of a decree of expropriation published in Spain while the NAVEMAR was at Buenos Aires. The District Court held that the Spanish Government could not bring itself within the rule of *Berizzi Bros. Co. v. The Pesaro, supra*, unless it could "show not merely that the vessel was the *property* of the Republic of Spain but also that it was *possessed* by that government and was *operated by it in its service and interest*. Otherwise immunity cannot be successfully urged to protect a ship, engaging in the carriage of merchandise for hire, from seizure by judicial process." (17 F. Supp. at 650.) At a second hearing before the Dis-

trict Court it was held that "constructive possession" flowing from ownership is not the equivalent of physical possession necessary to confer immunity (18 F. Supp. 157). The District Court was reversed by the Circuit Court of Appeals on the grounds that the allegations of possession and public service contained in the Ambassador's "Suggestion" were conclusive on the Court, and that in any event the Spanish Government had "constructive possession" which was sufficient as a basis for sovereign immunity.

This Court reversed the Circuit Court on both grounds and upheld the District Court. In a unanimous decision it held that the allegations in the Ambassador's Suggestion were not conclusive on the Court. It held that immunity was properly denied because the Spanish Government did not prove its claim that the NAVEMAR had been in the *possession* of the Spanish Government. Nor did it support its contention that the vessel was in fact employed in public service. That case, then, is authority for the proposition that a vessel owned by, but not in the actual possession and the public service of, a foreign government is not entitled to immunity.

The Navemar case, we submit, disposes of the only issue presented here. The distinction suggested by petitioners (Opening Brief p. 23) is untenable. In that case, and in our case, the plea of sovereign immunity was disallowed because the vessel was not in the possession of the sovereign nor in the public service and the fact of ownership by the sovereign was immaterial. If there be any distinction it would seem that a vessel expropriated by a government in time of war would more readily be given immunity than a ship which in peace time was turned

over to a private corporation for operation in a business venture.

The suggestion in *The Navemar* that a claim of immunity might be supported by some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government, is not applicable here. The Mexican Government took no steps, formal or otherwise, to repossess the vessel at any time before process was served. The officers and crew of the BAJA CALIFORNIA were in the employ and pay of the private corporation and were in no sense agents of, nor were they controlling the vessel in behalf of the Mexican Government.

The requirement of public service referred to in *The Navemar* as a prerequisite for immunity is well settled. *In re State of New York* (1920) 256 U. S. 503, stressed the fact that the exempt vessel was "employed in the public service of the state for governmental uses and purposes."

In *The Fidelity* (C. C., N. Y., 1879), Fed. Case No. 4758 the court said (8 Fed. Case, p. 1191):

> "Property does not necessarily become a part of the sovereignty because it is *owned* by the sovereign. To make it so it must be *devoted to the public use*, and must be employed in carrying on the operations of the government."

The necessity of *actual possession* emphasized in *The Navemar* is not a new doctrine. It was first clearly stated by this Court in *The Davis* (1870), 77 U. S. (10 Wall.) 15, where it was held that a salvage lien was enforceable against property belonging to, but not in the actual possession of the United States. See also *United States v.*

Wilder (1838), Fed. Cas. 16694, in which Judge Story held that a general average lien might be asserted on property belonging to the United States. The rule requiring actual possession as a basis for immunity was applied by Judge Addison Brown in *Long v. The Tampico* (S. D., N. Y. 1883) 16 Fed. 491, in allowing a salvage claim brought against a vessel intended for the Mexican Government as a revenue cutter, where the ship was not yet in the possession or public service of the government.

In *The Florence H* (S. D., N. Y. 1918) 248 Fed. 1012, Judge Learned Hand stated that the rule denying immunity without actual possession was not limited to salvage cases.

In *The Attualita* (C. C. A. 4th, 1916) 238 Fed. 909, a vessel requisitioned and in the service of the Italian Government was not accorded immunity where she was operated by private owners who paid the crew and all other expenses of the ship.

To the same effect is:

Maru Navigation Co. v. Societa Commerciale Italiana di Navigation (D. Md. 1921) 271 Fed. 97.

In *The Beaverton* (S. D., N. Y. 1919) 273 Fed. 539, the court denied immunity to a vessel under charter to the French Republic, but not in its possession, following the rule that the test of immunity was the possession of the foreign sovereign, not its ownership.

The Johnson Lighterage Co. No. 24 (D. N. J. 1916) 231 Fed. 363, held that a suit *in rem* might be maintained against the property of a foreign (Russian) government

for salvage services where the property at the time of seizure by the marshal was not in the actual possession of an officer of that government.

In *The Katingo Hadjipatera*, 1941 A. M. C. 581, 40 F. Supp. 546, affd. 119 F. (2d) 1022, cert. den. 313 U. S. 593, it was held that the Greek Government was not entitled to claim immunity for a vessel it had requisitioned where physical possession of the vessel had not been taken prior to the filing of the libel.

The Uxmal (D. Mass. 1941) 40 F. Supp. 258, denied immunity to the vessel owned by the Mexican Government where she had been delivered to a cooperative association of producers of sisal, even though the Mexican Government contributed to the capital of the association and had reserved the right to repossess the vessel in the case of national emergency. The Court held that ownership was not sufficient to confer immunity, the vessel not being in the possession nor the public service of the Republic of Mexico.

United States of Mexico v. Rask (1931), 118 Cal. App. 21, 4 Pac. (2d) 981 (Sup. Ct. hrg. denied 1931) rejected a claim of immunity by the Republic of Mexico as a defense to a repair lien asserted against a patrol boat owned by the Mexican Government. The immunity was refused because the government did not have possession of the boat.

Most of the cases where immunity was granted proceeded expressly on the theory that the foreign government had actual possession. This is true of *Berizzi Bros. Co. v. The Pesaro, supra*. It is also true of *The Carlo Poma* (C. C. A. 2d 1919) 259 Fed. 369, 370.

In *The Maipo* (S. D., N. Y. 1918) 252 Fed. 627, 629, the Court pointed out that the Chilean Government doubtless was at pains to keep a vessel in its possession for the very purpose of preserving her sovereign immunity.

In *Ervin v. Quintinalla* (C. C. A. 5th, 1938) 99 F. (2d) 935, the Court, in granting immunity, recognized that the claim of immunity was based upon actual possession in the Mexican Republic. The officers and crew expressly agreed to hold the ship for the government and were employed and paid by the government.

In *The Janko* (E. D., N. Y. 1944) 54 F. Supp. 241, 243, the Court held that possession of a vessel of a friendly foreign government is sufficient to give immunity and the question of ownership is immaterial.

Thus it will be seen, as Judge Woolsey remarked in *Bradford v. Chase National Bank of the City of New York* (S. D., N. Y. 1938) 24 F. Supp. 28, 36:

> "The touchstone of a successful claim of immunity for any property is that the property is in the possession of the sovereign. . . ."

The intimation in the District Court case of *The Roseric* (D. C., N. J., 1918), 254 Fed. 154, that the appropriation by a government of a vessel and its devotion to public service might be sufficient to confer immunity even without exclusive possession, cannot now be taken to be a correct expression of law, if it ever was.* In any

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*See Lawrence Preuss, State Immunity and the Requisition of Ships During the Spanish Civil War, 36 Am. Jour. Int. Law 37, 50, where the author points out that earlier decisions intimating that requisition alone operates to confer immunity without actual possession must be considered as overruled by *The Navemar*. See also note in 6 George Washington Law Review, 542.

event the case is inapplicable to our situation because the ROSERIC was being operated under the immediate direction and control of the British Government in connection with the prosecution of the war.

THE AUTHORITIES CITED BY PETITIONERS DO NOT SUPPORT THEIR CLAIM OF IMMUNITY.

It is of course axiomatic in our law that the state cannot be directly sued without its consent and that the same immunity has been accorded foreign governments by analogy. But the basis for the immunity of the domestic sovereign is not the same as the basis of the immunity of the foreign sovereign. The domestic sovereign is exempt from process without his consent on the ground that there can be no legal right as against the authority that makes the law upon which the right depends. The immunity of the foreign sovereign, however, does not stem from any lack of power. It flows from considerations of comity and practical expediency in friendly international intercourse.*

Property in the possession and public service of the sovereign is likewise exempted. But considerations of comity and expediency do not require the extension of the immunity to property which can be directly proceeded against without dispossessing the sovereign.

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*See John G. Hervey, Immunity of Foreign States When Engaged in Commercial Enterprises—a Proposed Solution, 27 Michigan Law Review, 751, 760;

Ernest Angell, Sovereign Immunity, The Modern Trend, 35 Yale Law Journal 150, 152.

The cases cited by petitioners do not sustain their position. *Kawananakoa v. Polyblank*, 205 U. S. 349; *Keokuk & Hamilton Bridge Co. v. U. S.*, 260 U. S. 125, *United States v. Clarke*, 33 U. S. (8 Pet.) 436, 444, simply state the general rule that the domestic sovereign is exempt from suit without its consent. *Belknap v. Schild*, 161 U. S. 10, holds that an injunction cannot be maintained to prevent the use of property actually in the possession of the United States. *In Re State of New York*, 256 U. S. 503, and *Briggs v. Light Boats*, 11 Allen (93 Mass.) 157, *The Siren*, 7 Wall. (74 U. S. 152, stand for the principle that property in the actual possession and control of the domestic government or one of the states, and employed in governmental service, is immune from seizure.

This is not a suit against the Republic of Mexico. It is a suit to enforce a lien on property which was not in the government's possession nor devoted to its public service. It is an action against the thing itself. It is settled in admiralty that the ship is liable for the tortious acts of anyone who lawfully comes into possession of her and directs her navigation, be he charterer, agent or crew. *The Barnstable* (1901), 181 U. S. 464, 467; *The China* (1868), 7 Wall. (74 U. S.) 53.

The cases cited by petitioners, such as *United States v. Rodgers*, 150 U. S. 249, applying in certain instances the fiction that a vessel is regarded as a part of the territory to which it belongs at home, do not have any bearing on the present case. It was aptly said by this Court in *Cunard Steamship Co. v. Mellon*, 262 U. S. 100, 123, that this "is a figure of speech, a metaphor." On page 124: "The merchant ship of one country, voluntarily entering

the territorial limits of another, subjects herself to the jurisdiction of the latter." In Fenwick on International Law, Second Revised Edition, page 218, it is said: "This fiction of the 'exterritoriality' of vessels, while it finds expression in numerous decisions of British and American courts, has been rejected by most modern writers. . . ." And again at page 222: "Merchant vessels in foreign ports are not exempt from civil suit *in rem* brought by a citizen of the foreign state. . . ." See also *Sharrenberg v. Dollar S. S. Co.*, 245 U. S. 122, 127.

The cases of *Oetjen v. Central Leather Co.*, 246 U. S. 297, and *U. S. v. Belmont*, 85 F. (2d) 543, are not in point. Those cases merely stand for the rule that acts of a foreign state done in its own territory and valid by its own laws, will be given recognition in our courts.

United States v. Allegheny Co. Pennsylvania (1944), 322 U. S. 174, is equally wide of the mark. That case deals with the constitutional relation between state and federal governments with regard to the taxation of governmental property. It does not remotely touch our question.

The Exchange (1812), 7 Cranch. (11 U. S.) 116, needs no other distinction than the fact that it concerned a warship in the actual possession of the French Government.

The Western Maid (1922), 257 U. S. 419, is likewise inapplicable. In that case this Court held that three vessels owned by or demised to the United States were immune from process. The WESTERN MAID was a transport carrying foodstuffs for civilian relief in Europe to be administered under the Food Administration Grain Corporation. It was manned by a Navy crew. The LIBERTY was a pilot boat, also manned by a Navy crew, and the CARO-

LINIAN was an Army transport in charge of an Army crew. Thus all three vessels were in the possession and public service of the sovereign. It is true that Mr. Justice Holmes does not stress the fact of possession in his opinion, but it is clear that he does not regard title as the significant criterion. His opinion turns on the public character of the services being performed, and the inference to be drawn from it is that the immunity might have been denied if the vessels could have been regarded as merchant vessels at the time the claims arose.

Dexter & Carpenter v. Kuniglig Jarnvagsstyrelsen, 43 F. (2d) 705, stands for the principle that a sovereign invoking the jurisdiction of a court waives immunity as respects that particular litigation, but does not subject its property generally to seizure on execution The case does not touch our problem, which has to do with the enforcement of a specific lien on a vessel neither in the possession nor public service of the sovereign.

The quotation from Benedict on Admiralty on the last page of petitioners' Opening Brief shows on its face that the refusal of jurisdiction *in rem* is limited to cases where the seizure results in a *dispossession* of the sovereign.

The English cases on sovereign immunity, as petitioners themselves suggest, are not really analogous to our own. The English procedure *in rem* is not like ours, basically an action against the *res* itself, but rather in substance an action against the owner coupled with the right of arrest.* As there is difficulty in any proceeding resembling a direct action against a foreign sovereign, the English cases have

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*See Robinson on Admiralty, p. 363. This difference in procedure is mentioned in *Berizzi Bros. Co. v. The Pesaro*, *supra*.

tended to be more sweeping in granting immunity than our own. *The Parlement Belge*, L. R. 5, P. D. 197, until recently has been regarded as the leading English case. The principle actually decided in that case was that a vessel in the possession of a foreign state, used primarily as a mail packet, was immune from process, although she was used subordinately for trading purposes. But the case also was based in part on the theory that a proceeding *in rem* under the English practice in effect impleads the owner and that therefore a proceeding against a vessel owned by a foreign state was objectionable because it indirectly impleaded that foreign state. It was on this latter principle that *The Porto Alexandre* [1920] P. 30, was decided. There the Court of Appeal agreed that the employment of a state-owned vessel for trading purposes did not deprive her of immunity. But these cases are probably no longer law in England.

In *The Annette; The Dora* [1919] P. 105, immunity was denied to two vessels which the Provisional Government of Northern Russia claimed to have requisitioned. The decision was based on two alternative grounds, first, that the government was not officially recognized by the British Foreign Office, and second, that if it were a sovereign government it had parted with the *possession*. The Court said (page 111):

> "But even if I were satisfied that the Provisional Government of Northern Russia was a sovereign state, I should then have to consider whether the government is in possession of this vessel. If it is not in possession, the Court interferes with no sovereign right of the government by arresting the vessel nor does it, by arresting the vessel, compel the government to submit to the jurisdiction or to abandon its possession."

The evidence showed that the vessel, after having been taken over by the Provisional Government of Northern Russia, was let out to hire to a partnership called "The Polar Star" for trading purposes. The Court (Mr. Justice Hill) said (page 112):

> "It seems to me that upon the vessel being handed over to that association, if she ever was in the possession of the Provisional Government she passed out of that possession and was put into the possession of this partnership, not as agents of the Provisional Government but under a contract by which, in effect, the vessel was demised to the partnership; and that from that time forward nobody was in possession of the vessel except the partners, or if the partners embrace more than the master and crew—it is not very clear how that is—she was in the possession of the master and crew for the partnership. The fact that by the contract it was provided that the trading should be under the control and instructions of an official of the Provisional Government does not seem to me to affect the possession of the vessel."

The first case on the sovereign immunity of a foreign vessel to go before the House of Lords was *The Cristina* [1938] A. C. 485. All that the House of Lords really decided in that case was that a vessel in the actual possession of a recognized foreign government which had obtained such possession for public (*i. e.*, non-commercial) purposes was immune, but the opinions of at least three of the Lords indicate that the immunity of purely commercial vessels is at least doubtful and that *The Porto Alexandre*, *supra*, is no longer the law in England. Fur-

thermore, the emphasis throughout the opinions of the Lords on possession strongly indicates that the English view as expressed in *The Annette, The Dora, supra*, is now identical with the American, that actual possession rather than ownership is the test for sovereign immunity. See, for example, the statement of Lord Macmillan (page 498):

> "I confess that I should hesitate to lay down that it is part of the law of England that an ordinary trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign state."

Lawrence Preuss, in an article "State Immunity and the Requisition of Ships During the Spanish Civil War," 35 Am. Jour. Int. Law 263, 269, says:

> "The *dicta* on this question are of the greatest general interest, since they foreshadow a possible future shift from the doctrine of absolute immunity held up to this time by the British courts. . . ."*

In *The Arantzazu Mendi* [1939] A. C. 256, a decision quite similar to *The Cristina*, the House of Lords again treated possession as the decisive, if not the indispensable factor to support a claim of sovereign immunity.

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*For other comment on *The Cristina*, see: 39 Columbia Law Rev. 510; 2 Modern Law Review 57; 16 New York University Law Quarterly Review, 490; and 54 Law Quarterly Review, 339. This Court pointed out in *The Navemar* that the *Cristina's* officers and crew were in the pay of the government.

THE MODERN TENDENCY IS TO RESTRICT, NOT ENLARGE, THE IMMUNITY OF STATE-OWNED COMMERCIAL VESSELS.

It is not true, as petitioners suggest, that "changing governmental structures" (Brief p. 24) require any enlargement of the immunity principle. The modern doctrine shows exactly the opposite tendency. The Brussels Convention of 1926 for the unification of certain rules relating to the immunity of state-owned vessels, provides that government owned or government operated commercial vessels, even those in the actual possession of the government, may be arrested the same as privately owned commercial ships. This convention was ratified by Mexico September 15, 1932 (see 6 Benedict on Admiralty, p. 55). While we do not contend it is binding here, since it has not yet been ratified by our own government, it shows that the Mexican Republic has agreed to the principle of non-immunity going far beyond the holding in our case. In the face of this convention, it is impossible for petitioners to contend that the acceptance of jurisdiction by the courts in this case was contrary to any recognized rule of international law.

Our own government has, of course, waived immunity from suit both with respect to its ships employed as merchant vessels (Suits in Admiralty Act, 46 U. S. C. A. §741) and with respect to the operation of "public," *i. e.* non-commercial, vessels (Public Vessels Act, 46 U. S. C. A., §781). There is almost universal agreement among the authorities on international law that a government operating commercial vessels should not in principle be entitled to claim immunity with respect thereto. Some of the reasons for this virtual unanimity of opinion are:

The large development of state-owned commercial ships has made the problem increasingly acute in recent years. The principle of immunity gives the government vessel an unfair competitive advantage over privately owned ships amounting to a subsidy at the expense of citizens of another country.

The theoretical basis for granting immunity is unsound. It is unrealistic to suppose that international complications will arise from enforcing liabilities against these merchant vessels by orderly court procedure. There is more chance for friction if the claims of private litigants are left to diplomatic action.

The makeshift diplomatic remedy is expensive, dilatory and inefficient. It leads to attempts to apply political influence, and just claims are rejected on the *ex parte* statements of nationals of the state owning the vessel. Only the courts have the necessary machinery for sifting evidence and disposing of such claims on their merits.

It is unjust to the citizens of the state of the forum to deprive them of a speedy and adequate remedy for the redress of proper claims against merchant vessels owned by another government.

Some of the authorities expressing these considerations are:

Westlake, Private International Law (7th Ed.), p. 269:

> "There is a growing feeling of jurists, both in England and the Continent, that the complete immunity granted to public vessels engaged in trade or to vessels requisitioned by the state, is contrary to sound principles."

Hall, International Law (8th Ed., 1924), p. 249, Note:

> "On general principles of justice it would appear that when a state engages in international trade its vessels so employed should be subject to the same treatment as private vessels in foreign ports, and there is a growing concensus of opinion in this direction which manifested itself at the London Conference of the International Maritime Committee in October, 1922."

Cheshire, Private International Law (2d Ed.), p. 96:

> "Recently, however, it has been widely recognized that ships engaged in commerce ought not to be immune from jurisdiction and by the Immunity of States' Ships Convention, concluded at Brussels in 1926, as amended by a protocol on May 24, 1934, it was agreed that commercial vessels and cargoes belonging to States should be justiciable to the same extent as if privately owned. . . ."

Jasper Y. Brinton, in an article entitled "*Suits Against Foreign States*," 25 Am. Jour. Int. Law, 50, 61, quotes the late President Loder of The Hague Court as follows:

> "Whenever a state becomes the owner of a ship or charterer or carrier for its own merchandise or for those of the public, it assumes the role of a private individual and should be treated as such; renunciation of immunity is to be presumed whenever it is a question of private rights."

And see 1 Oppenheim, International Law (5th Ed.), 668, 670; Fenwick, International Law (2d Ed.), 228; 1 Wheaton, International Law (6th English Edition), 240; Hyde, International Law, Section 257; Alfred Hayes, Private Claims against Sovereigns, 38 Harvard Law Re-

view, 599; and Lord Maugham's remarks in *The Cristina* [1938] A. C. 521.

We are not sure that we understand the basis of petitioners' assertion (Opening Brief p. 25) with respect to the status of lend-lease property. Petitioners' alarm in this connection seems to be without foundation. The decision in this case could not affect such property, at least if in the possession of agents or any government and employed for public purposes. None of it, so far as we are aware, is in the possession of private individuals for purely commercial purposes.

Nor do we believe there is any basis for petitioners' apprehension with respect to possible discrimination in favor of vessels owned and operated by the Soviet Union. It may well be that during the war Russian ships are owned and operated by the state, but we do not understand that this has been the Russian practice in times of peace. Lord Maugham said in *The Cristina* [1938] A. C. 485, 523:

> "The Soviet Republic has apparently adopted the admirable practice of owning its merchant ships through limited companies, and does not claim—even if it could, which for my part I should doubt—any immunity whatever in relation to such ships."

But even if there should be some discrimination, as petitioners suggest, in connection with widespread state operation of commercial vessels, the cure, we submit, would be a statute limiting or repealing the doctrine of *Berizzi Bros. Co. v. The Pesaro*, and not to extend *The Pesaro* decision beyond its present scope. To make that decision applicable to our case would mean overruling *The Navemar*. In other words, make all commercially operated

vessels subject to seizure, instead of granting immunity to them all, and do it, if that is what is wanted, by Congressional enactment or treaty.*

This would be doing nothing more than putting into effect the oft-repeated words of Mr. Justice Marshall in *The Bank of the United States v. The Planters Bank of Georgia* (1824), 22 U. S. (9 Wheat.) 904:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and take the character which belongs to its associates, and to the business which is to be transacted. * * *"

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*Nearly all the commentators and text writers believe that the doctrine of *The Pesaro* case should be limited or repealed. See, for example, Robinson on Admiralty, p. 277; 50 Yale Law Journal, 1088; 40 Harvard Law Review, 126; and 16 Boston University Law Review, 115.

The following articles recommend changing *The Pesaro* rule by statute: John G. Hervey, The Immunity of Foreign States When Engaged in Commercial Enterprises—a Proposed Solution, 27 Michigan Law Review, 751; Frederick Rockwell Sanborn, The Immunity of Merchant Vessels When Owned by Foreign Governments, 1 St. John's Law Review, 5. Notes in 36 Yale Law Journal, 145, and 3 George Washington Law Review, 65 suggest a treaty. Jesse Andrews Raymond, Sovereign Immunity in Admiralty, 9 Texas Law Review, 519, recommends a statute denying immunity to state owned commercial vessels but believes the matter could be reached by judicial decision.

It was said by this Court in *Cooke v. United States* (1875), 91 U. S. 389, 398:

> "Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there."

To sustain the decisions of the District Court and Circuit Court of Appeals in this case it is not necessary to disturb the doctrine of *Berizzi Bros. Co. v. The Pesaro*. But to reverse the decisions of the lower courts here would require a departure from the doctrine of *The Navemar*. On principle, there is no reason for reversing the decision of the Circuit Court of Appeals and every reason for affirming it.

Conclusion.

The District Court and the Circuit Court of Appeals followed well-settled rules in denying the claim of sovereign immunity in this case. The Republic of Mexico, as petitioners are at such pains to assert, is a friendly foreign power. But there should be nothing prejudicial to amicable international relations in enforcing the law applicable to a claim against a commercial vessel which the Republic voluntarily put into the possession and operation of a private corporation. No complaint is or could be made as to the fairness of the trial or the correctness of the decision on the merits of the claim. The Republic was given every opportunity to present its defenses and contest the case throughout. It saw fit not to appeal

except on the immunity issue. The sole fault of the BAJA CALIFORNIA for the collision and the resulting total loss of the LOTTIE CARSON stands conceded. Is it not a permissible inference that the Mexican Government itself was satisfied that the case on liability was correctly decided? And the sovereign immunity point was correctly decided too. The decision of the lower courts should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 455.—October Term, 1944.

The Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico, as Owner, Petitioners, *vs.* R. B. Hoffman.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

[February 5, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question is whether, in the absence of the adoption of any guiding policy by the Executive branch of the government the federal courts should recognize the immunity from a suit in rem in admiralty of a merchant vessel solely because it is owned though not possessed by a friendly foreign government.

Respondent, owner and master of the Lottie Carson, an American fishing vessel, filed a libel in rem in the district court for southern California against the Baja California, her engines, machinery, tackle and furniture, for damage alleged to have been caused when the Baja California negligently caused her tow to collide with the Lottie Carson in Mexican waters. The Mexican Ambassador to the United States, acting in behalf of his government, thereupon filed in the district court a suggestion that the Baja California at all the times mentioned in the libel and at the time of her seizure was owned by the Republic of Mexico and in its possession, and engaged in the transportation of cargoes between the ports of the Republic of Mexico and elsewhere. Libellant put in issue the allegations of the suggestion that title to the Baja California was at any time in the Mexican government and denied that she was in that government's possession, public service or use. Trial of these issues proceeded upon stipulated evidence.

In the meantime the United States Attorney for the District, acting under direction of the Attorney General, filed in the district court a communication from the Secretary of State to the Attorney General, in which the State Department called attention to the claim of the Mexican government, already detailed,

The Department took no position with respect to the asserted immunity of the vessel from suit other than to cite *Ervin* v. *Quintanilla*, 99 F. 2d 935, and *Compania Espanola* v. *The Navemar*, 303 U. S. 68. In *Ervin* v. *Quintanilla, supra*, the asserted immunity from suit of *The San Ricardo*, a vessel of the Mexican government, was allowed by the court on the ground that at the time of her seizure upon a libel in rem she was in the possession and service of that government. And in *Compania Espanola* v. *The Navemar, supra*, the State Department having failed to recognize the claimed immunity of the Spanish vessel Navemar, alleged to have been expropriated by and in the possession of the friendly Republic of Spain at the time of her seizure upon a libel in rem, this Court denied the claimed immunity on the ground that the libelled vessel was not shown to have been in the possession and public service of the foreign government.

The district court was unable to find, under the rule of *The Navemar, supra*, any ground for relinquishing the jurisdiction over the vessel, and accordingly denied the claim of immunity. The Mexican government then filed an answer to the libel by which it put in issue the material allegations of the libel on the merits and renewed its claim of sovereign immunity from the suit. The court then proceeded with the trial on the merits.

A second suggestion was then filed by the United States Attorney at the direction of the Attorney General, transmitting a communication from the State Department, stating that it accepted as true the contention that the Baja California was the property of the Mexican government and that it recognized a statement by the Mexican Ambassador that his government would meet any liability decreed against the vessel as a binding international undertaking. The district court denied the claim of immunity, finding that the ship was in "the possession, operation, and control" of the Compania Mexicana de Navigacion del Pacifico, S. de R. L. This was a privately owned and operated Mexican corporation engaged in the commercial carriage of cargoes for hire for private shippers. On the merits the district court gave judgment for the libellant.

The Circuit Court of Appeals for the Ninth Circuit affirmed, 143 F. 2d 854, holding on the authority of *The Navemar, supra*, and *The Katingo Hadjipatera*, 119 F. 2d 1022, that the Baja California, although owned by the Mexican government, was not immune from

suit because not in its possession and service. We granted certiorari, — U. S. —, on a petition which presented the question whether title of the vessel without possession in the Mexican government is sufficient to call for judicial recognition of the asserted immunity.

The decisions of the two courts below that the vessel was not in the possession or service of the Mexican government are supported by evidence and call for no extended review here. It is sufficient that it appears that before the injury to the Lottie Carson the Baja California was delivered by the Mexican government to the privately owned and operated Mexican corporation under a contract for a term of five years. As provided by the contract the corporation was to operate the vessel at its own expense in a private freighting venture on the high seas between Mexican ports and between them and foreign ports, and did so operate the vessel until her seizure upon the libel. The officers and crew were selected, controlled and paid by the corporation. For the use of the vessel the corporation agreed to pay to the Mexican government fifty per cent of the net profits of operations but undertook to bear all net losses.

The principal contention of petitioner is that our courts should recognize the title of the Mexican government as a ground for immunity from suit even though the vessel was not in the possession and public service of that government. Ever since *The Exchange*, 6 Cranch. 116, this Government has recognized such immunity from suit, of a vessel in the possession and service of a friendly foreign government, *L'Invincible*, 1 Wheat. 238, 252; *The Divina Pastora*, 4 Wheat. 52, 64; *United States* v. *Cornell Steamboat Co.*, 202 U. S. 184, 190; *Ex parte Muir*, 254 U. S. 522, 531-533; *The Pesaro*, 255 U. S. 216, 219; *Ex parte State of New York*, 256 U. S. 503, 510; *Compania Espanola* v. *The Navemar*, *supra*, 74; *Ex parte Peru*, 318 U. S. 578, 588, a practice which seems to have been followed without serious difficulties to the courts or embarrassment to the executive branch of the government. And in *The Exchange*, Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when

its certificate to that effect is presented to the court by the Attorney General. *United States* v. *Lee*, 106 U. S. 196, 209; *Ex parte Muir, supra*, 533; *The Pesaro, supra*, 217; *Compania Espanola* v. *The Navemar, supra*, 74; *Ex parte Peru, supra*, 588. This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings. *Compania Espanola* v. *The Navemar, supra*; *Ex parte Peru, supra.*

In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist. That is to say, it is for them to decide whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations. See *Ex parte Peru, supra*, 588.

Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. "In such cases the judicial department of this government follows the action of the political branch and will not embarrass the latter by assuming an antagonistic jurisdiction". *United States* v. *Lee, supra*, 209; *Ex parte Peru, supra*, 588.

It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.[1] The

[1] This salutary principle was not followed in Berizzi Bros. Co. v. S. S. Pesaro, 271 U. S. 562, where the court allowed the immunity, for the first time, to a merchant vessel owned by a foreign government and in its possession and service, although the State Department had declined to recognize the immunity. The propriety of thus extending the immunity where the political branch of the government had refused to act was not considered.

Since the vessel here, although owned by the Mexican Government, was not in its possession and service, we have no occasion to consider the questions presented in the Berizzi case. It is enough that we find no persuasive ground for allowing the immunity in this case, an important reason being that the State Department has declined to recognize it.

judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. *Ex parte Peru, supra,* 588. But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.

When such a seizure occurs the friendly foreign government may adopt the procedure of asking the State Department to allow it. But the foreign government may also present its claim of immunity by appearance in the suit and by way of defense to the libel. In such a case the court will inquire whether the ground of immunity is one which it is the established policy of the department to recognize. *Ex parte Muir, supra,* 533; *Compania Espanola* v. *The Navemar, supra,* 74. Such a policy, long and consistently recognized and often certified by the State Department and for that reason acted upon by the courts even when not so certified, is that of allowing the immunity from suit of a vessel in the possession and service of a foreign government.

It has been held below, as in *The Navemar*, to be decisive of the case that the vessel when seized by judicial process was not in the possession and service of the foreign government. Here both courts have found that the Republic of Mexico is the owner of the seized vessel. The State Department has certified that it recognizes such ownership, but it has refrained from certifying that it allows the immunity or recognizes ownership of the vessel without possession by the Mexican government as a ground for immunity. It does not appear that the Department has ever allowed a claim of immunity on that ground, and we are cited to no case in which a federal court has done so. In *The Davis*, 10 Wall. 15, this Court held that a salvage lien was enforcible against property belonging to but not in actual possession of the United States, and in this it followed a decision of Judge Story in *United States* v. *Wilder*, Fed. Cas. 16694. And in *The Fidelity*, Fed. Cas. No. 4758, (8 Fed. Cas. at 1191) Chief Justice Waite said of the ruling of *The Davis*: "Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public

use and must be employed in carrying on the operations of the government."

In the case of *The Navemar, supra*, the Spanish Ambassador asserted on behalf of the Spanish Republic that the seized vessel was the property of the Republic, acquired by expropriation from a Spanish National, but the claim of immunity which had not been recognized by our government was rejected by the Court on the ground that the Spanish government was not in possession of the vessel at the time of her arrest.[2]

The lower federal courts have consistently refused to allow claims of immunity based on title of the claimant foreign government without possession, both before *The Navemar, supra*, *Long* v. *The Tampico*, 16 Fed. 491, 493, 494 (opinion by Judge Addison Brown); *The Johnson Lighterage Co. No. 24*, 231 Fed. 365; *The Attualita*, 238 Fed. 909; *The Carlo Poma*, 259 Fed. 369, 370, reversed on other grounds 255 U. S. 219; *The Beaverton*, 273 Fed. 539, 540; and since, *Ervin* v. *Quintanilla, supra*, 941; *The Urmal*, 40 F. Supp. 258, 260; *The Katingo Hadjipatera*, 40 F. Supp. 546, 119 F. 2d 1022; *The Ljubica Matkovic*, 49 F. Supp. 936.

Whether this distinction between possession and title may be thought to depend upon the aggravation of the indignity where the interference with the vessel ousts the possession of a foreign state, *Sullivan* v. *State of Sao Paulo*, 122 F. 2d 355, 360, it is plain that the distinction is supported by the overwhelming weight of authority. More important, and we think controlling in the present circumstances, is the fact that, despite numerous opportunities like the present to recognize immunity from suit of a vessel owned and not possessed by a foreign government, this

[2] The Cristina, 1938, A. C. 485, in which the immunity was recognized, seems to have proceeded on the ground that the possession taken in behalf of the friendly foreign government was actual. Similarly in The Arantzazu Mendi, 1939, A. C. 256, 263, the sovereign was "in fact in possession of the ship". In The Jupiter, 1924, P. 236, 241, 244 (cf. The Jupiter No. 2, 1925, P. 69; The Jupiter No. 3, 1927, P. 122, 125), it appeared that before the suit was brought the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. And in The Porto Alexandre, 1920, P. 30, 34, the vessel had been requisitioned under the order of the foreign government and on the particular voyage was carrying freight for that government. In The Annette; The Dora, 1919, P. 105, 111, an alternative ground of decision was that the sovereign had parted with possession. The Court said: "If it is not in possession, the Court interferes with no sovereign right of the government by arresting the vessel, nor does it, by arresting the vessel, compel the government to submit to the jurisdiction or to abandon its possession."

government has failed to do so. We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize. We have considered but do not find it necessary to discuss other contentions of petitioner, as they are without merit.

Affirmed.

Mr. Justice FRANKFURTER, concurring.

In *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562, this Court held for the first time that "merchant ships owned and operated by a foreign government have the same immunity that warships have." It did so not because the Department of State by appropriate suggestion or through its established policy had indicated that due regard for our international relations counseled such an abnegation of jurisdiction over government-owned merchantmen. On the contrary. In answer to an inquiry by Judge Mack before whom the Pesaro's claim to immunity was first raised, the Department of State took this position: "It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character." *The Pesaro*, 277 Fed. 473, 479-480, note 3; and see 2 Hackworth, Digest of International Law, pp. 429-430, 438-439. Thus, in *Berizzi Bros Co.* v. *S. S. Pesaro, supra*, this Court felt free to reject the State Department's views on international policy and to formulate its own judgment on what wise international relations demanded. The Court now seems to indicate however that when, upon the seizure of a vessel of a foreign government, sovereign immunity is claimed, the issue is whether the vessel "was of a character and operated under conditions entitling it to the immunity in conformity with the principles accepted by the department of the government charged with the conduct of our foreign relations."

If this be an implied recession from the decision in *Beriz Bros Co.* v. *Pesaro,* I heartily welcome it. Adjudication shou not borrow trouble by worrying about a case not calling f decision. It is for me not borrowing trouble to raise the rel tion of the *Pesaro* decision to the situation now before the Cou I appreciate that the disposition of the present case turns on t want of possession by the Republic of Mexico. My difficulty that "possession" is too tenuous a distinction on the basis which to differentiate between foreign government-owned ve sels engaged merely in trade that are immune from suit ar those that are not. Possession, actual or constructive, is a leg concept full of pitfalls. Even where only private interests a involved the determination of possession as bankruptcy cas for instance, abundantly prove, engenders much confusion a conflict. Ascertainment of what constitutes possession or whe it is, is too subtle and precarious a task for transfer to a field which international interests and susceptibilities are involved.

If the Republic of Mexico now saw fit to put one junior nav officer on merchantmen which it owns but are operated by a priva agency under arrangements giving that Government a financ interest in the venture, it would, I should suppose, be embarra ing to find that Mexico herself did not intend to be in possessi of such ships. And, certainly, the terms of the financial arran ment by which the commercial enterprise before the Court is c ried on can readily be varied without much change in substa to manifest a relation to the ship by Mexico which could not eas be deemed to disclose a want of possession by Mexico.

The fact of the matter is that the result in *Berizzi Bros. Co S. S. Pesaro, supra,* was reached without submission by the partment of State of its relevant policies in the conduct of foreign relations and largely on the basis of considerations wh have steadily lost whatever validity they may then have Compare the overruling of *The Thomas Jefferson,* 10 Wh 428 (1825), by *The Genesee Chief,* 12 How. 443 (1851). views of our State Department against immunity for comm cial ships owned by foreign governments have been stron supported by international conferences, some held after the cision in the *Pesaro* case. See Lord Maugham in *Compania N era Vascongado* v. *S. S. Cristina* [1938] A. C. 485, 521-523. the real change has been the enormous growth, particularly

recent years, of "ordinary merchandizing" activity by governments. See *The Western Maid*, 257 U. S. 419, 432. Lord Maugham in the *Cristina* thus put the matter:

> "Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country?" [1938] A. C. 485, 521-522.

And so, sensible as I am of the weight to which the decision in the *Pesaro* is entitled, its implications in the light of the important developments in the international scene that twenty years have brought call for its reconsideration. The Department of State, in acting upon views such as those expressed by Lord Maugham, should no longer be embarrassed by having the decision in the *Pesaro* remain unquestioned, and the lower courts should be relieved from the duty of drawing distinctions that are too nice to draw.

It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when "the department of the government charged with the conduct of our foreign relations", or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.

Mr. Justice BLACK joins in this opinion.